IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

EARL JOHNSON, Plaintiff, VS. ABLT TRUCKING CO., INC., and TED TAMMEN, Defendants.	)	CASE NO. 01-1187-DWB

MEMORANDUM AND ORDER

This diversity case, which arose out of an accident on Interstate 135 South of Newton, Kansas, was tried to a jury beginning on Tuesday, August 27, 2002. Late in the evening of Friday, August 30, 2003, the jury returned its verdict. The jury had been provided with a special verdict form[1] which it completed as follows:

[1] When comparative negligence of the parties is an issue, Kansas law requires the jury to return a special verdict. K.S.A. 60-258a(b). The verdict form submitted to the jury in this case was taken directly from the pattern instructions used in Kansas. ***Pattern Instructions Kansas 3rd, Civil*** § 181.04 [hereafter "***PIK***"] While it may be difficult to determine whether a particular verdict form is a general verdict with special interrogatories under Fed.R.Civ.P. 49(b) or a special verdict under Fed.R.Civ.P. 49(a), *see e.g.,* ***Resolution Trust Corp. v. Stone,*** 998 F.2d 1534, 1545-47 (10th Cir. 1993) and ***Jarvis v. Ford Motor Co.,*** 283 F.3d 33, 66-67 (2nd Cir. 2002), the court concludes that the form used here was a special verdict under Rule 49(a).

VERDICT FORM

We, the Jury, impaneled and sworn in the above entitled case, upon our oaths, do make the following answers to the questions propounded by the court:

1. Do you find any of the parties to be at fault?
   Answer: Yes X No _____

Proceed to question 2 only if you answered "yes" to question 1.

2. Considering all the fault at 100%, what percentage of the fault is attributable to each of the following persons:

Earl Johnson	10 %
Ted Tammen	90 %
Total	100%

Proceed to the remaining question only if you found the fault of Plaintiff Earl Johnson to be less than 50% of the total fault.

3. Without considering the percentage of fault set forth in question 2, what damages do you find were sustained by plaintiff?

a.	Noneconomic loss to date	$ 0
b.	Future noneconomic loss	$ 0
c.	Medical expenses to date	$ 39,482.46
d.	Economic loss to date	$ 75,000
e.	Future economic loss	$ 325,000
	Total	$429,482.46

Upon receipt of the verdict, the court asked counsel if there was any reason not to enter judgment based upon the jury's verdict. Neither party made any objection. The court then directed the Clerk of the Court to enter judgment on the next business day. On Tuesday, September 3, 2002, the Clerk filed a separate

judgment form entering judgment for plaintiff in the amount of $395,482.46.[2] (Doc. 57).

On September 13, 2002, defendants filed a timely motion for new trial pursuant to Fed.R.Civ.P. 59, and a supporting memorandum. (Doc's 64 & 65). Plaintiff filed a memorandum opposing the motion (Doc. 68), and defendants filed a reply (Doc. 65). The court has reviewed the motion and memoranda and is prepared to rule. For the reasons set forth below, the Court holds that defendants motion should be denied.

I. Standards for Granting a New Trial.

Fed.R.Civ.P. 59(a) provides that in jury cases, a new trial may be granted on all or part of the issues "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." When presented with a claim that a special verdict under Fed.R.Civ.P. 49(a) is inconsistent, the court's duty in evaluating the jury verdict is to try to reconcile the answers to avoid retrial. ***Harvey By and Through Harvey v. General Motors Corp.,*** 873 F.2d 1343, 1346 (10th Cir. 1989). It is the court's duty to reconcile the answers, rather than to look for inconsistencies, and the jury responses are to be reconciled

[2] The amount of the judgment was reduced by the 10% comparative fault which the jury assessed to plaintiff.

not merely to one another, but to the entire case. *Id.* at 1347-48. When considering claims of inconsistency, the court must accept any reasonable view of the case that makes the jury's answers consistent. ***Heno v. Spint/United Management Co.,*** 208 F.3d 847, 851-52 (10th Cir. 2000), citing ***Patton v. TIC United Corp.,*** 77 F.3d 1235, 1241 (10th Cir. 1996). *See also* ***Jarvis v. Commercial Union Assur. Cos.,*** 823 F.2d 392, 395-96 (10th Cir. 1987) (court must harmonize inconsistent verdicts and set them aside "only when cacophony reigns").

II. Arguments of the parties.

Defendants argue that the special verdict is inconsistent and irreconcilable because the jury awarded $ 0 in damages for pain or suffering (*i.e.,* non-economic damage[3]), while awarding a significant sum for economic loss. Defendants point out that plaintiff's testimony about his severe pain was the only medical basis for any monetary claim for lost wages or other economic losses. Defendants also argue that the failure to award any amount for pain and suffering is also inconsistent with the jury's award of substantial medical expenses. Defendants rely on Kansas cases which granted new trials where the jury failed to award any amount for pain and suffering, citing ***Germann v. Blatchford,*** 246 Kan. 532, 539,

[3] The jury was instructed that non-economic loss included pain and suffering as well as disability and any accompanying mental anguish. Instruction No. 21(1).

792 P.2d 1059 (1990) and ***Miller v. Zep Mfg. Co.,*** 249 Kan. 34, 46-47, 815 P.2d 506 (1991). Defendants argue that where it is uncontradicted that a plaintiff incurred pain and suffering, an award of significant medical expenses cannot be reconciled with no award for pain and suffering, citing ***Gans v. C.F. Menninger Memorial Hospital,*** 888 F.Supp. 125, 127 (D.Kan. 1995), *aff'd* 94 F.3d 655 (10th Cir. 1996).

Plaintiff counters that the jury verdict is not inconsistent or irreconcilable and a new trial is not required, citing ***Gans*** and ***Fitzpatrick v. Allen,*** 24 Kan.App.2d 896, 907, 955 P.2d 141, 149 (1988). Plaintiff points out that all of the cases cited by defendants involve complaints by a plaintiff about the lack of an award for pain and suffering, whereas in this case, plaintiff considers the award to be adequate. Finally, plaintiff argues that defendants "are simply angling for another shot at a jury in the desperate hope for a better result." (Doc. 68 at 3). In the alternative, plaintiff urges that if the court determines that a new trial on damages is necessary, the new trial should be limited to the question of damages for pain and suffering, and the present verdict awarding economic damages and medical expenses should stand.

In their reply, defendants counter that any new trial must involve all issues

and not merely the issue of non-economic damages. [4]

III. Discussion.

We begin by addressing plaintiff's assertion that defendants are merely "angling for another shot at the jury." (Doc. 68 at 3). Obviously, the best procedure would have been for the jury to resolve any apparent inconsistencies in the answers on the special verdict form prior to their discharge. *See* ***Heno,*** 208 F.3d at 853. This could have been accomplished had either party raised an objection to the verdict prior to discharge of the jury; however, no such objection was made.[5] Likewise, the court could have raised the issue *sua sponte.* That was not done.

The fact that defendants did not make any objection to the inconsistency of the verdict prior to discharge of the jury, however, does not constitute a waiver of

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[4] Defendants' reply contains the heading "A New Trial on All of Plaintiff's Damages is Necessary," but in the body of the reply defendants urge that "[a] new trial on all issues is required." (Doc. 69 at 2) (emphasis added). The court assumes this is a request for a new trial on all issues – both liability and damages.

[5] *See, e.g.,* ***Stowers v. Rimel,*** 19 Kan.App.2d 723, 875 P.2d 1002 (1994) (where the court instructed the jury to resume its deliberations to consider damages for pain and suffering because the initial verdict awarded no damages for that element even though the evidence was uncontradicted that plaintiff had experienced pain and suffering). In these circumstances, ***PIK*** suggests the use of an additional instruction that states: "In view of your findings, the law requires that you award some amount for pain and suffering. You should resume you deliberations to determine that amount." *See* ***PIK*** § 171.01, Notes on Use.

their right to seek a new trial. In the Tenth Circuit, a party challenging an alleged inconsistency in a special verdict under Rule 49(a) is not required to object to the inconsistency before the jury is discharged in order to preserve that issue for a subsequent motion before the district court. ***Heno,*** 208 F.3d at 851-52.[6] While defendants obviously are angling for another shot at a jury in this case, they are legally entitled to do so.

We then proceed to a determination of whether the jury's refusal to award any non-economic damages for pain and suffering is so inconsistent or irreconcilable with its award of substantial medical expenses and substantial economic damages for loss of wages and/or earnings that a new trial is required. In diversity cases, federal courts look to state law to determine whether a verdict is, in fact, inconsistent. ***Moore's Federal Practice (3rd Ed.),*** § 49.20[1] at p. 49-46; ***Conte v. General Housewares Corp.,*** 215 F.3d 628, 639 (6th Cir. 2000), citing ***Tipton v. Michlin Tire Co.,*** 101 F.3d 1145, 1148 n. 4 (6th Cir. 1996).

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[6] One legal commentator cites ***Bell v. Mickelson,*** 710 F.2d 611, 616 (10th Cir. 1983) for the proposition that the Tenth Circuit requires an objection to inconsistency of a special verdict prior to the discharge of the jury. *See* ***Moore's Federal Practice (3rd Ed.),*** § 49.11[6] at p. 49-42, n. 96. Subsequent decisions from the Tenth Circuit, however, clearly are to the contrary. *See* ***Heno,*** 208 F.3d at 851-52; ***Thompson v. State Farm Fire & Cas. Co.,*** 34 F.3d 932, 944 (10th Cir. 1994); ***Bonin v. Tour West, Inc.,*** 896 F.2d 1260, 1263 (10th Cir. 1990).

The main instruction on damages was Instruction No. 19 which stated:

> In determining the amount of damages sustained by the plaintiff, you should allow the amount of money which will reasonably compensate plaintiff for plaintiff's injuries and losses resulting from the occurrence in question. The amount of damages you determine should include any of the following shown by the evidence:
>
> a. Pain, suffering, or disabilities, and any accompanying mental anguish suffered by plaintiff to date (and those plaintiff is reasonably expected to experience in the future);
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> b. The reasonable expenses of necessary medical care, hospitalization and treatment received;
>
> c. Loss of time or income to date by reason of plaintiff's disabilities (and that which plaintiff is reasonably expected to lose in the future [reduced to present value]); and
>
> d. Aggravation of any preexisting ailment or condition.
>
> In determining the amount of damages you should consider plaintiff's age, condition of health before and after, and the nature, extent and duration of the injuries. For such items as pain, suffering, disability, and mental anguish, there is no unit value and no mathematical formula the court can give you. You should allow such sum as will fairly and adequately compensate plaintiff. The amount to be allowed rests within your sound discretion.

This instruction was taken directly from ***PIK*** § 171.01.[7]

We first note that the jury awarded plaintiff the full amount of medical expenses which he sought to recover – $ 39,482.46. The parties stipulated to the accuracy of the medical bills in order to avoid the need to introduce voluminous medical billing statements and proofs of payment. In their closing argument, however, defendants vigorously argued that a some of the medical bills ($4,691.53) were for treatment of plaintiff's left knee which defendants contended was not injured as a result of the subject accident. The jury's award of the full amount of past medical expenses [8] sustained by plaintiff clearly rejected defendants' causation argument.

Likewise, the jury's determination of the amount of economic damages sustained by plaintiff – $75,000 in past damages and $325,000 in future damages – fell within the range of economic damages presented by plaintiff. Plaintiff's expert witness, Dr. James Horrell testified that plaintiff's economic damages, if

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[7] The legal substance of jury instructions in a diversity case is a matter of state law. ***Domann v. Vigil,*** 261 F.3d 980, 984 (10th Cir. 2001).

[8] Because there was no evidence concerning the amount of any possible <u>future</u> medical expenses, the jury instructions did not allow any award for such expenses.

plaintiff were found to be 100% disabled, were between $462,571 and $534,324.[9] Both in cross-examination of plaintiff's economic expert and in closing argument, defendants adamantly disputed plaintiff's claim for future wage loss, particularly by questioning the accuracy and validity of plaintiff's prior earnings records. The jury's award of substantial economic damages obviously rejected defendants' position.

As to plaintiff's claim for pain and suffering, there was no dispute that because of the severe nature of the accident, plaintiff did in fact experience some amount of pain and suffering. In closing argument, defendants' counsel admitted that plaintiff was hurt in the accident, but questioned how much he was hurt. Defendants' counsel went on to point out that pain and suffering was an intangible that is difficult to measure and only the jury could measure it. The clear tenor of defendants' argument was that plaintiff was entitled to some damages for pain and suffering, but those damages should not be substantial because plaintiff would or should recover from the aches and pains he suffered in the accident.

Defendants now argue in support of their motion for a new trial, that all of plaintiff's expert medical or vocational witnesses based their opinion that plaintiff

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[9] The difference between the two numbers resulted from different assumptions by the expert concerning plaintiff's annual earnings based on his past work history.

could not work in the future on plaintiff's subjective complaints of pain from his injuries. (Doc. 65 at 2). Therefore, defendants reason that if the jury awarded no damages for pain and suffering, *ergo* there is no reason plaintiff could not engage in gainful employment, therefore no basis for the jury to have awarded economic damages.

Under the Kansas cases cited by the parties, the jury's failure to award any damages for pain and suffering is clearly inconsistent with the admission that plaintiff experienced some pain and suffering as a result of the accident. Therefore, if plaintiff had filed a motion for new trial based upon the inadequacy of the award for pain and suffering, this inconsistency might well justify a new trial on damages.[10] In fact, that is precisely the factual situation presented in each of the state court cases cited by the parties. *See* ***Germann v. Blatchford,*** 246 Kan. at 539 (plaintiff's appeal based on inadequacy of the verdict where jury awarded nothing for pain and suffering although the uncontroverted evidence was that plaintiff did experience some pain and suffering); ***Miller v. Zep Mfg. Co.,*** 249

[10] Even where the jury's failure to award damages for pain and suffering is contrary to uncontroverted evidence in the record, one court refused to grant plaintiff's motion for new trial. ***Fitzpatrick v. Allen,*** 24 Kan.App.2d 896, 955 P.2d 141, *pet. for rev. denied,* 264 Kan. 821 (1998). In so holding the court noted that the plaintiff had not shown that the jury's action substantially prejudiced his rights. 24 Kan.App.2d at 907-908.

Kan. at 46-47 (cross-appeal by plaintiff for jury's failure to award damages for past medical expenses and for pain and suffering); ***Timmerman v. Schroeder,*** 203 Kan. 397, 454 P.2d 522 (1969) (plaintiff's appeal from a general verdict awarding only the amount of the past medical expenses claiming that the award was inadequate and based on passion and prejudice.). In each of these cases, like the present case, the fact of some degree of pain and suffering was uncontroverted.[11]

In the case, however, plaintiff makes no claim that the verdict was inadequate; in fact, plaintiff expressly states that the overall award is adequate. (Doc. 68 at 3) ("Plaintiff considers the verdict adequate in light of the evidenced presented at trial."). Instead, it is defendants who seek a new trial. Defendants are obviously not claiming that the verdict was inadequate. Therefore, the legal basis on which the Kansas cases were decided, *i.e.,* a conflict which makes the verdict inadequate, does not support defendants' position in this case. In fact, the court has been unable to find any case where a defendant sought a new trial because of the jury's refusal to award plaintiff with damages for pain and suffering while

[11] Plaintiff cites ***Gans v. C.F. Menninger Memorial Hospital,*** 888 F.Supp. at 127 for the proposition that if the evidence concerning pain and suffering is controverted, then the jury's refusal to award damages for pain and suffering will not require a new trial. While plaintiff in this case argues that evidence concerning pain and suffering was controverted at trial, similar to ***Gans***, that is not precisely correct. Here, the existence of some pain and suffering was admitted by defendants; only the nature and extent of plaintiff's pain and suffering was in dispute.

awarding damages for medical expenses and/or economic damages. Nor has either of the parties cited any such case.

Defendants' argument is apparently based on their belief that the jury intentionally decided not to award any damages at all for pain and suffering because plaintiff either did not experience any pain from the accident (a conclusion which is contrary to defendants' own admission), or the pain would presumably abate with time thus enabling plaintiff to return to gainful employment at some time in the future.

The first problem with this argument is that the jury was never instructed that it had to award damages of one type in order to award damages of another type, and no such instruction was requested by the parties. Instruction No. 19 only required the jury to "allow the amount of money which will reasonably compensate plaintiff for plaintiff's injuries and losses resulting from the occurrence in question." While Instruction No. 19 continues by stating that "[T]he amount of damages you determine should include any of the following [categories of damages] shown by the evidence," this language is certainly not as definite as the supplemental instruction that could have been given had the parties objected to the verdict before the jury was discharged. ***PIK***, *supra* n. 5 ("the law requires that you award some amount for pain and suffering").

Moreover, defendants' argument is troubling because it attempts to impose a rigid formula and relationship between damages for pain and suffering and economic damages for future inability to engage in gainful employment. What amount of damages for pain and suffering would be necessary under defendants' theory to support a conclusion that plaintiff could recover economic damages for his inability to engage in future gainful employment? Would an award for pain and suffering of $1,000 have been sufficient? What about $10,000? Where, as in this case, the award of economic damages is approximately 75-86% of the amounts calculated by plaintiff's expert witness, would defendants' reasoning lead to the conclusion that only an award of something close to the maximum statutory amount of non-economic damages ($250,000 under K.S.A. 60-19a02) could support this substantial award of economic damages?

The ultimate problem with defendants' argument is that it requires the court to do the impossible – "to read the collective mind of the jury and determine why it answered the special verdict form in the way that it did." ***Heno,*** 208 F.3d at 853. This is something the court simply cannot do.

From a review of the jury's verdict, the court can, however, readily conclude that the jury definitively found for the plaintiff on the issue of liability and also believed that plaintiff had suffered significant damages, rejecting

defendants' arguments about the amount of medical expenses and economic damages that were appropriate. This is demonstrated by the fact that the jury found only 10% comparative fault attributable to plaintiff, and by its award to plaintiff of all past medical expenses and a significant award of economic damages for both the past and the future. In this case, the jury's failure to award any amount for pain and suffering might just as easily have resulted from their belief that, considering the overall award of damages, they were following Instruction No. 19 by awarding damages in an amount that would "reasonably compensate plaintiff for plaintiff's injuries and losses resulting from the occurrence in question."[12] This is particularly true since the jury was told both in the written instructions and in counsel's closing arguments, that there was no unit value or mathematical formula that could be used to determine an award of damages for pain and suffering, and the amount to be awarded was left to the jury's sound discretion. Defendants' theory that the failure to award one type of damages is so inconsistent that it automatically vitiates a damage award for other types of

[12] In ***Miller v. Zep Mfg. Co.***, a defendant who did not want a new trial made precisely this same argument, *i.e.,* that the overall jury award was adequate and reasonable and the failure to put any damages in these specific categories was simply a mischaracterization by the jury of the specific elements of the total damage claim. 249 Kan. at 46. Because the question was whether the verdict was adequate (a question not present in this case), the court rejected this argument and granted a new trial.

damages is not persuasive.

Even if the jury was confused by the instructions as to whether they had to had to award damages for each category of damages, the court believes that defendants have failed to show any resulting substantial prejudice. *See, e.g.,* ***Fitzpatrick v. Allen,*** 24 Kan.App.2d at 907-08. *See also* ***Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.,*** 106 F.3d 1388, 1401-02 (7th Cir. 1997) (jury confusion with regard to special verdict form does not require vacating the jury's award of damage where the jury's intent to award the overall total amount of damages was clear).

First, there is no indication that the failure to award damages for pain and suffering was any "awkward attempt" by the jury to rule for defendants. *See e.g.,* ***Cheney v. Moler,*** 285 F.2d 116, 118, n. 1 (noting that in some instances a verdict for plaintiff with an award of "no damages" has been held to be an awkward attempt to hold for the defendant, but finding that such reasoning is not persuasive).[13] The jury's answers concerning liability, medical expenses and

[13] In ***Cheney***, the jury was given four separate verdict forms covering a combination of awards dealing with plaintiff's claim and defendant's counterclaim arising out of the same incident. After finding for plaintiff on his claim, the jury did not award any damages at all. The court held that this "reflect[s] a lack of understanding upon the part of the jury and show[s] that the jury either returned an erroneous verdict or did not understand their duty to assess damages if a determination of liability was intended." 285 F.2d at 118. That situation is clearly

economic damages are contrary to any suggestion that they intended to somehow rule for defendants.

Furthermore, there is no evidence that the jury compromised by artificially or improperly allocating more damages to the economic category than was supported by the evidence. The jury award of $400,000 in economic damages, was less than the amounts calculated by plaintiff's expert witness.

Nor is there any indication that the failure to award damages for pain and suffering was an attempt to compromise on the issue of liability. *Cf.* ***Fitzpatrick v. Allen,*** 24 Kan.App.2d at 907-908. The determination of fault was substantially against the defendants and is further supported by the substantial award for medical expenses and economic damages.

Under these circumstances, the court does not find that the answers to the questions on the verdict form are inconsistent and irreconcilable and a new trial is not required.

Because the court has decided not to grant a new trial, there is no need to address plaintiff's alternative argument that any new trial should involve only the

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distinguishable from the present case where the jury was given separate questions on the various types of damages and did in fact award significant damages of two particular types (medical expenses and economic damages), but failed to award damages on a third type (pain and suffering).

issue of the amount of non-economic damages.[14]

IV. Costs.

On or about September 16, 2002, plaintiffs submitted a Bill of Costs to the Clerk of the District Court, in the total amount of $7,381.89. Defendants immediately filed their Objection to Plaintiff's Bill of Costs (Doc. 67), arguing that the bill of costs was premature under the court's local rules.

D.Kan.Rule 54.1(a)provides that a bill of costs shall be filed "within 30 days (a) after the expiration of time allowed for appeal of a final judgment or decree, or (b) after receipt by the clerk of an order terminating the action on appeal." In this case, the bill of costs was filed before the time had expired for appeal from the entry of judgment on September 13, 2003 (Doc. 57). Moreover, the filing of a motion for new trial by defendants has extended the time for filing an appeal.

The intent of the local rule is to have the bill of costs filed within 30 days after the case is terminated – either because the time for appeal has expired or, if

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[14] While courts often consider whether a new trial should be granted on damages alone or on all issues, *see e.g.,* ***Morris Knudsen Corp. v. Fireman's Fund Ins. Co.,*** 175 F.3d 1221, 1255-58 (10th Cir. 1999) and ***Miller v. Zep Mfg. Co.,*** 249 Kan. at 47-49, plaintiff cites no case to support his argument that a new trial can be granted on only one specific element of damages in a case where there is but a single claim for relief.

an appeal has been taken, after an order terminating the appeal. Neither of those events has yet occurred and the court agrees that the bill of costs was prematurely filed. Therefore, defendants' objection to the bill of costs is SUSTAINED. Plaintiff may file its bill of costs at the appropriate time in the future. By sustaining defendants' objection, however, the court is not making any determination as to the validity of any specific item of cost included in the bill previously filed by plaintiff.

IT IS THEREFORE ORDERED that defendants' motion for new trial (Doc. 64) is hereby DENIED.

IT IS FURTHER ORDERED that defendants' Objection to Plaintiff's Bill of Costs (Doc. 67) is SUSTAINED.

Copies of this order shall be mailed to counsel of record.

DATED this ___ day of January, 2003.

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DONALD W. BOSTWICK
United States Magistrate Judge